No. 89-816

(3)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

CITY OF LOS ANGELES;
BOARD OF PENSION COMMISSIONERS
OF THE CITY OF LOS ANGELES,
Petitioners,

VS.

UNITED FIREFIGHTERS OF LOS ANGELES CITY,
LOCAL 112, IAFF, AFL-CIO; LOS ANGELES POLICE
PROTECTIVE LEAGUE; RONALD DEAN GRAY;
DAVID BACA, JR.; GREGORY PAUL DUST;
BILL G. MCDANIEL; AND FRED TREDY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. MCDONOUGH*
J. STEVEN GREENFELD
BALL, HUNT, HART, BROWN AND
BAERWITZ
4525 Wilshire Boulevard,
Third Floor
Los Angeles, California 90010-3886
(213) 937-8999

LESTER G. OSTROV
FOGEL, FELDMAN, OSTROV,
RINGLER & KLEVENS
5900 Wilshire Boulevard,
Suite 2600
Los Angeles, California 90036
(213) 937-6250
Attorneys for Respondents

*Counsel of Record

Bureau of Los Angeles, Inc., Law Printers. (213) 741-6800

42 pp

QUESTIONS PRESENTED

1. Whether the petition for certiorari should be denied because this case was decided below primarily on state grounds.

2. Whether the petition should be denied because there are not special and important reasons for review of this case on writ of certiorari.

3. Whether the petition should be denied because there is no conflict between the decision of the California Court of Appeal and that of the Fourth Circuit Court of Appeals in *Maryland State Teachers Ass'n v. Hughes*, No. 84-2213 (4th Cir. Dec. 5, 1985).

4. Whether the petition should be denied because the courts below correctly held that the California Constitution, California law, and Article I, § 10, cl. 1, of the United States Constitution ("the federal Contract Clause") invalidate the attempt of the City of Los Angeles to impair the vested contractual rights of Los Angeles police officers and firefighters to earn pension benefits on terms substantially the same as those in effect when they were employed and that became effective during their employment.

THE PARTIES

In addition to the parties listed in the caption, all persons who were active Los Angeles police officers and firefighters on July 1, 1982 and were hired before December 1980 and their dependents have a financial interest in the outcome of this case.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

Cases

TABLE OF AUTHORITIES CITED

CASES

Rule

Statutes

TABLE OF AUTHORITIES CITED

STATUTES

Textbooks

No. 89-816

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CITY OF LOS ANGELES;
BOARD OF PENSION COMMISSIONERS
OF THE CITY OF LOS ANGELES,
Petitioners,

VS.

UNITED FIREFIGHTERS OF LOS ANGELES CITY,
LOCAL 112, IAFF, AFL-CIO; LOS ANGELES POLICE
PROTECTIVE LEAGUE; RONALD DEAN GRAY;
DAVID BACA, JR.; GREGORY PAUL DUST;
BILL G. MCDANIEL; AND FRED TREDY,
Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED

U.S. Const. art. I, § 10, cl. 1:

> No State shall pass any . . . Law impairing the Obligation of Contracts . . . .

California Const. art. I, § 9:

> A . . . law impairing the obligation of contracts may not be passed.

Los Angeles City Charter Art. XVII, XVIII:

> The text of these articles appears in the Appendix to the petition ("App.") beginning at pages 81a and 130a.

STATEMENT OF THE CASE

Petitioners' statement of the case is essentially accurate as far as it goes, except in the following particulars:

1. When the Los Angeles electorate voted in 1971 to "uncap" the annual cost of living adjustment ("COLA") to the pensions of the retired police officer and firefighter members of the pension systems established by Articles XVII and XVIII of the Los Angeles City Charter ("the pension systems"), their decision was not a mistake, much less a "disastrous mistake" (petition, p. 3). That action, which merely assured that the purchasing power of pensions initially granted would not be eroded by inflation, was reasonable then and remains reasonable today.

2. Charter Amendment H does not diminish affected pensions only "slightly" (petition, pp. 3, 4); it reduces them substantially. The evidence showed and the trial court found that Charter Amendment H will result in pension benefit losses ranging from hundreds of thousands to millions of dollars for individual members of

the pension systems. 6 C.T. 2039-2045, 2057;[1] trial court decision, App. 43a-44a.[2]

3. It is not true that when the COLAs were uncapped in 1971, the cost to the City of Los Angeles ("the City") was projected to be approximately $3.75 million per year or that future COLA costs were essentially impossible to predict (petition, p. 3). At trial *petitioners* introduced an exhibit showing that the City projected in 1971 that uncapping the COLAs would cost an additional amount, ranging from a low of $3.75 million to a high in excess of $14 million, in fiscal year 1971-72. 6 C.T. 2269. Petitioners introduced another trial exhibit which, based on the 1971-1972 estimate, projected that the additional high-end cost of uncapping the COLA would be $35.1 million for fiscal year 1982-1983. 9 C.T. 3060. This figure is $3.1 million *more* than the figure which the City calculated in 1982 would be the first year's budget savings as a result of the passage of Charter Amendment H. 8 C.T. 2762. Moreover, Dr. C. Edwin Piper, the City's Chief Administrative Officer when the COLAs were uncapped, warned the City Council in 1971 that there was a risk of higher than anticipated inflation and recommended, for that reason, that the COLA cap be raised from 2% to 3% rather than removed. 9 C.T. 3071.

---

[1]In this brief, references to the clerk's transcript on appeal to the California Court of Appeal are made by volume and page numer, *e.g.*, 1 C.T. 50-55; references to the reporter's transcript are made by page and line number, *e.g.*, R.T. 20:6-18.

[2]Using the same assumptions as those used by petitioners in administering the pension systems, respondents demonstrated at trial that Charter Amendment H has a substantial adverse effect on the pensions of affected police officers and firefighters. For example, Trial Exhibit 1 showed that if plaintiff Baca were to retire in 1995 at age 47 after 25 years of service and live to age 78 in 2026, his cumulative pension losses to that date caused by Charter Amendment H would be $792,138.12. 6 C.T. 2039.

Petitioners' statement of the case does not include a significant number of additional facts which are discussed, as relevant, in the following parts of this brief.

THE DECISIONS OF THE COURTS BELOW

In a cogent Statement of Decision the trial court declared Charter Amendment H invalid. App. 32a-68a. The court of appeal affirmed the trial court's judgment in full. *United Firefighters of Los Angeles City v. City of Los Angeles,* 210 Cal.App.3d 1095, 259 Cal.Rptr. 65 (1989), reprinted at App. 1a-27a. Both courts concluded that the COLA cap provision enacted by Charter Amendment H substantially impaired vested contractual pension rights of affected members of the Los Angeles police and fire pension systems. Trial court decision, App. 65a-66a; court of appeal decision, 210 Cal.App.3d at 1102, App. 3a. The trial court specifically found that the impairment of pension benefits caused by Charter Amendment H does not satisfy the California test for permissible modifications of vested contractual pension benefits, announced by the California Supreme Court in *Allen v. City of Long Beach,* 45 Cal.2d 128, 131, 287 P.2d 765 (1955), *i.e.,* that a modification which results in disadvantages must be accompanies by comparable new advantages to the public employees whose pension benefits are impaired.[3] Both courts concluded that Charter Amendment H does not bear a material relation to the theory of the pension systems and their successful operation, another requirement of the *Allen* decision.[4] Both courts rejected petition-

---

[3]Trial court decision, App. 47a. On appeal and in their petition for review to the California Supreme Court, petitioners did not claim that the detriment caused by Charter Amendment H was compensated by comparable new advantages to the affected pension system members, nor do they make that claim in the petition for certiorari.

[4]Trial court decision, App. 66a; court of appeal decision, 210 Cal.App.3d at 1113, App. 20a-21a.

ers' argument that Charter Amendment H is valid because it allegedly affects only "unearned" pension benefits.[5]

The decisions below discuss and reject petitioners' contention that the substantial impairment of vested contractual pension rights intended and accomplished by Charter Amendment H is legally permissible.[6] Petitioners introduced at trial the testimony of various City officials that, in their opinions, Charter Amendment H was and is reasonable and necessary to (1) preserve the financial soundness of the City; (2) enable the City to predict and plan for long-range budgeting and financing; (3) enable the City to continue providing essential public services; and (4) preserve the pension systems themselves.[7] The trial court accepted the testimony of City officials that they hold these opinions.[8] *However, both courts found that petitioners failed to show that the City could not afford to pay the affected COLAs.*[9] In reaching this conclusion, both courts relied upon stipulations of the parties or uncontradicted evidence that:

— the cost of paying the benefits provided by the police and fire pension systems is a general obligation of the City.[10]

— the City ended each fiscal year from 1976-77 through 1985-86 without having spent all of the

---

[5]Trial court decision, App. 45a-47a; court of appeal decision, 210 Cal.App.3d at 1104-05, App. 6a-8a.

[6]Trial court decision, App. 48a-65a; court of appeal decision, 210 Cal.App.3d at 1108-1117, App. 13a-26a.

[7]Trial court decision, App. 61a-62a; court of appeal decision, 210 Cal.App.3d at 1111, App. 18a.

[8]Trial court decision, App. 62a.

[9]Trial court decision, App. 62a-64a; court of appeal decision, 210 Cal.App.3d at 1111-1115, App. 18a-24a.

[10]Trial court decision, App. 49a-50a.

funds in the City's general budget for that year and with unexpended surplus funds in amounts ranging up to $70 million.[11]

— in each fiscal year after 1981-82, when Charter Amendment H was adopted, the City's general budget increased by about $200 million (10%) over the prior year, with the result that the City's 1986-87 general budget of $2.36 billion was almost *$1 billion more* than the budget in 1981-82.[12]

— when there was a prospective City general budget shortfall of approximately $142 million in fiscal year 1983-84 — *less than one year after the City Council proposed Charter Amendment H* — the Council imposed new taxes and fees totalling *$120-$130 million* to finance that year's budget and the City has continued those increased taxes and fees in effect ever since.[13]

— based on the actuarial testimony presented by *petitioners* at trial, the invalidation of Charter Amendment H will require the City to make additional annual contributions of about $43 million per year to the pension systems.[14] This represented less than 1% of the City's total 1986-87 budget (including the budgets of independent City departments such as the Department of Airports and Harbor Department) and less than 2% of the City's 1986-87 general budget, and will be a diminishing percentage of the City's budgets as they increase in future years.[15]

---

[11] *Id.*, 63a.

[12] *Ibid.*

[13] *Ibid.*

[14] *Id.*, 59a.

[15] *Ibid.*

Based on this record, the trial court found and concluded:

> The evidence does not demonstrate that the City was unable to raise additional revenues, or unable at any time in 1981, 1982, or thereafter to meet its financial obligations. The evidence is not convincing that there existed a financial emergency or grave fiscal crisis which made it impossible for the City to meet its obligation to the pension systems.[16]
>
> * * *
>
> The defendants have not convinced this Court that the fiscal picture for Los Angeles is even as bleak today as it was in 1981-82 when Amendment H was debated and enacted. Certainly inflation has slowed and revenues and budgets have increased. Nor have defendants convinced the Court that the future looks bleaker.[17]
>
> * * *
>
> Defendants have not carried their burden of proving that the City is unable to impose any additional taxes, increase existing taxes, or unable to reorder its spending priorities.[18]
>
> * * *
>
> From the time Amendment H was enacted in 1982, the City has failed to contribute the $43 million recommended by the actuaries to fund that part of the City's contribution attributable to the uncapped COLA. At the same time the general City Budget, and taxes and revenues have increased. The City has either spent the $43 million for other purposes

---

[16] *Id.*, 63a.

[17] *Id.*, 64a.

[18] *Ibid.*

deemed more important, or maintained it as part of the general reserve fund.[19]

Based on these determinations, the trial court concluded that the City's decision to spend for other purposes the money necessary to fund respondents' uncapped COLAs "may make good 'political' sense," but is not justified under the Contract Clauses of the California and United States Constitutions.[20] The court of appeal concurred.[21]

The trial court also found that as of June 1982, the Los Angeles police and fire pension systems had a $3.37 billion "unfunded accrued actuarial liability," consisting of the excess of the present value of the systems' projected liabilities over the present value of the systems' assets, expected income from those assets, and the normal contributions which the City Charter requires the City and the affected police officers and firefighters to make in the future.[22] Petitioners pointed to this fact as a purported justification for the enactment of Charter Amendment H. However, the trial court found, based on the testimony of *petitioners'* expert witnesses, that the existence and size of this unfunded liability was largely caused by acts and omissions of petitioners themselves in the administration of the pension systems over the years.[23] The court of appeal sustained this finding of the trial court and held that "any instability or loss of

---

[19] *Id.*, 67a.

[20] *Id.*, 64a.

[21] Court of Appeal decision, 210 Cal.App.3d at 1114, App. 22a-23a.

[22] Trial court decision, App. 57a.

[23] *Id.*, 57a-58a. These included:

— the funding of the Article XVII pension system on a pay-as-you-go basis from 1923 until 1959;

— the commencement of the Article XVIII pension system on July 1, 1967, with an actuarially unfunded liability of $258 million transferred from the Article XVII system;

integrity and soundness in the pension systems resulted principally from the foregoing acts and omissions [of petitioners], not from full cost of living adjustments indexed to the Consumer Price Index."[24] Citing *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 313, 152 Cal.Rptr. 903, 591 P.2d 1 (1979), the court of appeal held that a public entity cannot justify the impairment of public employees' pension rights on the basis of an alleged fiscal crisis which was created by the entity's own voluntary conduct.[25] The court of appeal also held that of the other three alleged "important public purposes" offered by petitioners to justify Charter Amendment H—their desire to (1) spend City revenues for other purposes deemed more important,

---

— the establishment in 1967 of a 70-year unfunded liability amortization period for the Article XVII and Article XVIII pension systems;

— the failure of petitioner Pension Board, when recommending the City contributions necessary to finance the pension systems, to make realistic assumptions respecting annual increases in the Consumer Price Index upon which annual pension adjustments are based;

— the failure of petitioner Pension Board, prior to 1976, to consider in its annual valuation of the pension systems projected salary increases of active members, even though such increases directly affect the size of members' pensions;

— the failure of petitioner Pension Board, after 1976, to make realistic assumptions of the salary increases which would be granted active members of the pension systems; and

— the City's decision in 1976 to change from level-dollar annual payments to amortize the pension systems' unfunded liability to payments calculated as a percentage of Los Angeles police and fire departments payroll, thus decreasing the City's contributions in earlier years and increasing them in later years.

[24]Court of appeal decision, 210 Cal.App.3d at 1112-13, App. 20a.

[25]*Id.*, 210 Cal.App.3d at 1113, App. 20a.

(2) be able to plan better for long-range budgeting, and (3) improve the morale of City employees not entitled to an uncapped COLA—none justified the substantial impairment of vested contractual pension rights caused by Charter Amendment H.[26]

REASONS WHY THIS CASE SHOULD NOT BE REVIEWED ON WRIT OF CERTIORARI

I. The Petition for Certiorari Should be Denied Because This Case Was Decided Below Primarily on State Grounds.

In deciding this case, the lower courts relied primarily upon well-settled California decisional law, discussed *infra*, respecting the inviolability of the pension rights and benefits of California public employees. California cases decided during a period of over 40 years had established that (1) the right of a California public employee to qualify for the pension benefits then in effect vests upon his acceptance of public employment;[27] (2) the public employer cannot eliminate or impair the employee's contractual right to qualify for and receive those pension benefits;[28] (3) a public employee also has a vested right to receive any new benefits provided for by changes in the pension system made during the employee's period of service;[29] and (4) any modification of public employees' pension rights must bear some material relation to the theory of a pension system and its successful operation and disadvantageous modifications should be accompa-

---

[26] *Id.*, 210 Cal.App.3d at 1114-1115, App. 22a-24a.

[27] *Kern v. City of Long Beach*, 29 Cal.2d 848, 852-53, 179 P.2d 799 (1947).

[28] *Ibid.*

[29] *Betts v. Board of Administration of the Public Employees Retirement System*, 21 Cal.3d 859, 866, 148 Cal.Rptr. 158, 582 P.2d 614 (1978).

nied by comparable new advantages.[30] Based on these decisions, the trial court held that the COLA-capping City Charter provisions enacted by Charter Amendment H are invalid and unenforceable "because each of them is a law impairing the obligation of contract within the meaning of Article 1, Section 9, of the Constitution of the State of California" — *before* the court made reference to Article 1, § 10, cl. 1 of the Constitution of the United States as an additional ground of decision.[31]

That the decisions below are firmly grounded on the California Contract Clause, as well as California decisional law, is supported by three additional considerations. *First*, article I, section 24 of the California Constitution provides that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." *Second*, California courts have consistently and uniformly held that the California Constitution is not a clone of its federal counterpart but an independent force. Thus, in *In re William G.*, 40 Cal.3d 550, 221 Cal.Rptr. 118, 709 P.2d 1287 (1985), the California Supreme Court, in holding that the defendant's right to be free from unreasonable searches and seizures had been violated, said:

> We rest our decision on both state and federal law. Unless otherwise indicated, references to the Fourth Amendment are also intended to refer to article I, section 13, of the California Constitution. Similarly, the federal cases upon which we rely are intended to also support certain aspects of *the independent state grounds of our decision*, as the federal cases prescribe the minimum standards that may not be violated. "This court has always assumed the *independent*

---

[30] *Allen v. City of Long Beach*, 45 Cal.2d 128, 131, 287 P.2d 765 (1955).

[31] Trial court decision, App. 68a; trial court judgment, App. 70a-71a.

> *vitality* of our state Constitution. In the search and seizure area our decisions have often comported with federal law, yet there has never been any question that this similarity *was a matter of choice and not compulsion.*" ([Citation]; see also art. I, section 24, Cal. Const.: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.") . . .

(*Id.*, 40 Cal.3d at 557-558, n.5 (citations omitted; emphasis added).) *See, also, People v. Brisendine*, 13 Cal.3d 528, 548-550, 119 Cal.Rptr. 315, 531 P.2d 1099 (1975); *People v. Houston*, 42 Cal.3d 595, 609, 230 Cal.Rptr. 141, 724 P.2d 1166 (1986); *People v. Mayoff*, 42 Cal.3d 1302, 1312, 233 Cal.Rptr. 2, 729 P.2d 166 (1986).

Third, in 1979 the California voters approved constitutional initiative Proposition 1, which amended article I, section 7 of the California Constitution. The amendment prohibited California courts from going beyond the requirements of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution in the use of pupil assignment and school busing as remedies for racial discrimination in public education. The amendment overruled California decisions ordering such remedies in the absence of intentional segregation, a prerequisite under federal law. Proposition 1 is relevant here in two respects: (1) the amendment to article I, section 7, is narrowly limited to a specific type of case arising under the equal protection provision of the California Constitution; all other provisions of the state Constitution remain independent of the U.S. Constitution; and (2) the amendment demonstrates that the independent force and effect of the California Constitution is so fundamental that a constitutional amendment is necessary to overcome that independence in a particular instance.

Based on the foregoing, it is clear that the California Contract Clause and well-established principles of Cali-

fornia decisional law were relied upon by the trial and appellate courts below as the primary bases for holding Charter Amendment H invalid.

II. The Petition Should Be Denied Because There are no Special And Important Reasons For Review of This Case on Writ of Certiorari.

Review on writ of certiorari will be granted "only when there are special and important reasons therefor." Supreme Court Rule 17. Such reasons are not present in this case because the decisions below were based on the resolution of factual issues unique to this controversy. At the trial, which lasted 10 days, respondents first proved the existence and impairment of their vested contractual rights to uncapped COLA benefits and rested. Petitioners then undertook the burden of proving their affirmative defense, that the impairment was justified because of the future cost of the COLAs capped by Charter Amendment H. In support of that effort, petitioners called 11 witnesses, including four expert witnesses,[32] and introduced 130 exhibits. In rebuttal, respondents called three expert witnesses and introduced 19 exhibits. After weighing this conflicting evidence, the trial court held that petitioners had not carried their burden of proof on the impairment issue and entered a judgment for respondents. The judgment was affirmed by the court of appeal and the California Supreme Court declined to review the appellate court's decision. There is surely no special or important reason why this Court should undertake to determine whether the California courts correctly resolved the primarily factual issues relating to petitioners' affirmative defense that the City's impairment of respondents' pension benefits was justified because of the City's financial situation.

---

[32]Respondents' objections to the testimony of one expert witness was sustained.

III. The Petition Should Be Denied Because There Is No Conflict Between The Decision of The California Court of Appeal And That of The Fourth Circuit Court of Appeals in *Maryland State Teachers Ass'n v. Hughes.*

There is no conflict between the decision of the California Court of Appeal in this case and the per curiam decision of the Fourth Circuit Court of Appeals in *Maryland State Teachers Assn. v. Hughes*, 594 F. Supp. 1353 (D. Md. 1984), *aff'd*, No. 84-2213 (4th Cir. Dec. 5, 1985), App. 211a. This is because the State of Maryland has specifically reserved the unlimited power unilaterally to amend or alter public employee contracts. *Id.*, 594 F. Supp. at 1362. Maryland thus does not confer vested contract status on public employee pension benefits. Applying this Maryland law, the district court held in the *Maryland Teachers* case that the pension rights and benefits of Maryland teachers were not impaired by statutes imposing a COLA cap on "unearned" benefits. 594 F. Supp. at 1364. The Court of Appeals affirmed.

California law is, of course, completely to the contrary, as shown by the decisions below and such other decisions as *Pasadena Police Officers' Association v. City of Pasadena*, 147 Cal.App.3d 695, 701, 195 Cal.Rptr. 339 (1983); *Allen v. City of Long Beach*, 45 Cal.2d 128, 131, 287 P.2d 765 (1955); and *Kern v. City of Long Beach*, 45 Cal.2d 848, 852-53, 179 P.2d 799 (1947).[33] Accordingly, this case presents no conflict, within the meaning of Rule 17.1.(b), between the decision of the California Court of

[33]Moreover, the district court in the *Maryland* case concluded that the state's obligation to fund its teachers' retirement system was not a clear financial obligation within the meaning of *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977). *Id.*, 594 F. Supp. at 1370-71. Whatever may be the merit of that view, there could be no clearer financial obligation of a municipality than that of petitioners to pay pensions, including applicable COLAs, when they fall due.

Appeal and the per curiam decision of the Fourth Circuit Court of Appeals in the *Maryland Teachers* case. Nor does the case otherwise merit review on writ of certiorari, for the reasons discussed above.[34]

---

[34]Petitioners also rely on *Amalgamated Transit Union Local 589 v. Commonwealth of Massachusetts,* 666 F.2d 618 (1st Cir. (1981), *cert. denied,* 475 U.S. 1117 (1982), which rejected a federal Contract Clause challenge to Massachusetts statutes that plaintiff Union contended impaired arbitration provisions in its contract with the publicly owned Transit Authority (petition, pp. 25-26). The court there held that plaintiffs did not have a contract right to retention of the arbitration provisions under Massachusetts law (which itself distinguishes that case from this one) but nevertheless proceeded to discuss the Contract Clause question. Central to the court's conclusion was its view that the challenged legislation did not affect *substantive contract rights* but only the Union's *procedural remedy* of arbitration — a remedy which the court doubted could have played more than a small role in inducing an employee to work for the Transit Authority. *Id.,* 666 F.2d at 640. In contrast, respondent's vested contractual pension rights impaired by Charter Amendment H are clearly substantive and of the type that have always been accorded the highest degree of protection by California courts. *See, e.g., Carman v. Alvord,* 31 Cal.3d 318 at 325, fn. 4, 182 Cal.Rptr. 506, 644 P.2d 192 (1982). *See, also, United States Trust Company of New York v. New Jersey, supra,* 431 U.S. 1 at 19, fn. 17 ("a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement").

IV. The Petition for Certiorari Should be Denied Because the Courts Below Correctly Decided That Charter Amendment H Violates the California Constitution, California Law and the Federal Contract Clause.

A. Respondents Have a Vested Contractual Right to The COLA Benefits Which Charter Amendment H Impaired.

1. The Existence and Extent of Respondents' Pension Rights and Benefits Must Be Determined by Reference to California Law.

Petitioners contend that this Court should independently determine "whether there was a contract within the meaning of the federal Contract Clause," citing *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1932), for the proposition that in a case involving the federal Contract Clause, the existence of the contract and the nature and extent of its obligations become federal questions on which finality cannot be accorded to the views of a state court. (Petition, p. 9.) Respondents do not deny that this Court made that statement in *Irving* and has made substantially similar statements in other cases. However, there are several reasons why the Court would not be warranted in determining that respondents do not have vested contractual rights to the COLA pension benefits impaired by Charter Amendment H.

First, with but few exceptions, this Court has reversed a state court decision concerning the existence or obligations of a contract only when the state court had held that the claimed contractual obligation did not exist, *i.e.*, when the Court's independent determination was necessary to make effective the federal constitutional protection em-

bodied in the Clause.[35] In this case, the California courts below held that a contract both existed and was impaired.

Second, when in federal Contract Clause cases the Court has made an independent determination respecting the existence and obligations of the contract in issue, the Court has based its decision in each case on a close analysis of the law of the state in which the case arose, not on a separate body of contract law promulgated by this Court.[36] Indeed, no other mode of decision would be permissible, at least since *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), was decided.

Third, the Court has frequently said that in determining the existence and obligations of a contract in federal Contract Clause cases, the Court gives great deference to the decisions of the state courts on that issue.[37] The decisions of the courts below are entitled to that deference in this case.

---

[35]*State v. Brand,* 303 U.S. 95 (1938); *Coombs v. Getz,* 285 U.S. 434 (1931); *Mississippi v. Miller,* 276 U.S. 174 (1928); *Appleby v. City of New York,* 271 U.S. 364 (1925); *Columbia Railway, Gas & Electric Co. v. State of South Carolina,* 261 U.S. 236 (1923); *Detroit United Railway v. Michigan,* 242 U.S. 238 (1916); *Grand Trunk Western R. Co. v. City of South Bend,* 227 U.S. 544 (1913); *Stearns v. State of Minnesota,* 179 U.S. 223 (1900); *Houston & T. C. R. Co. v. Texas,* 177 U.S. 66 (1900); *McCullough v. Commonwealth of Virginia,* 172 U.S. 102 (1898); *Mobile & C. R. Co. v. State of Tennessee,* 153 U.S. 486 (1894).

[36]See cases cited in footnote 35.

[37]*Atlantic Coast Line R. Co. v. Phillips,* 332 U.S. 168, 170 (1947) ("It is not for us to read such a local law with independent but innocent eyes, heedless of a construction put upon it by a local court"); *New York Rapid Transit Corporation v. City of New York,* 303 U.S. 573, 593 (1938) (in determining the existence and meaning of a contract, this Court leans toward agreement with the courts of the state and accepts their statement unless it is manifestly wrong); *State v. Brand,* 303 U.S. 95, 100 (1938); *Coombs v. Getz,* 285 U.S. 434, 441 (1931); *Stearns v. Minnesota,* 179 U.S. 223, 233-34 (1900).

Fourth, there can be no doubt that an independent examination of California law by this Court would disclose that — as is demonstrated in the following section of this brief — respondents have a vested contractual right to the COLAs impaired by Charter Amendment H. It is this law which the courts below applied in deciding the case.[38] Petitioners argued strenuously below (including in their unsuccessful petition for review to the California Supreme Court) that the well-settled California law respecting the inviolability of the pension rights and benefits of public employees is wrong, anomalous, and undesirable as a matter of public policy.[39] Even if those arguments were well-founded — which respondents deny — that would be irrelevant here. The relevant question is what the law of California is, not whether it reflects what petitioners contend is the better view.[40] Petitioners' public policy arguments regarding California public employee

---

[38]Trial court decision App. 65a; court of appeal decision, 210 Cal.App.3d at 1102- 04, App. 3a-6a; *see also, Carman v. Alvord,* 31 Cal.3d 318, 332, 182 Cal.Rptr. 506, 644 P.2d 192 (1982) ("This Court has said that '[t]he pension provisions of a City Charter or ordinance form an integral part of the employment contract.' ").

[39]Petitioners contend that the court of appeal characterized the difference between the pension rights and the other rights of California public employees as "an anomaly" (petition, p. 8). What that court in fact said was that "*If* this creates an anomaly in the law, it is one sanctioned by the California Supreme Court" (court of appeal decision, 210 Cal.App.3d at 1105, App. 8a; emphasis added).

[40]Petitioners contend that respondents do not have a contractual right to uncapped COLA benefits. True, the parties did not enter written contracts which included such provisions. But it is hornbook law that a unilateral contract results when one party offers benefits or other consideration in exchange for an act by the other and the act then follows in response to the offer. 1 Witkin, *Summary of California Law,* Contracts § 14, pp. 48-49 (9th ed. 1987); Restatement of Contracts, Second, §§ 18, 19, 29, 30 (1981); 1 Williston *Contracts* §§ 22A, 36, 65, 68 (3d ed. 1957).

pensions are properly addressed to the California legislature and California courts — not to this Court.

2. Respondents Had and Have a Vested Contractual Right Under California Law to the COLA Benefits Which Charter Amendment H Impaired.

Under California law, a public employee's right to a pension "is among those rights clearly 'favored' by the law." *Hittle v. Santa Barbara County Employees Retirement Assn.*, 39 Cal.3d 374, 390, 216 Cal.Rptr. 733, 703 P.2d 73 (1985). It has long been settled that pension laws are to be liberally construed and applied, to protect pensioners and their dependents against economic insecurity. *Ibid.* California courts have consistently held that a California public employee has a vested contractual right to qualify for the pension benefits in effect when he commences employment and that this right cannot be substantially impaired by the employing public entity.

In the seminal case, *Kern v. City of Long Beach*, 29 Cal.2d 848, 851-56, 179 P.2d 799 (1947), the California Supreme Court held that (1) the right to qualify for the pension benefits then in effect vests upon acceptance of public employment, (2) the public employer cannot eliminate or impair the employee's contractual right to qualify for and receive pension benefits after that right has vested and (3) the purpose of this rule of vesting is to make effective and enforceable the promise of pensions to government employees to induce competent persons to enter and remain in public employment. In *Betts v. Board of Administration of the Public Employees Retirement System*, 21 Cal.3d 859, 866, 148 Cal.Rptr. 158, 582 P.2d 614 (1978), the California Supreme Court held that a public employee has a vested right to receive, *in addition* to the benefits in effect upon commencement of his employment, any new benefits provided for by changes in the pension system made during the employee's period of service.

Accord, Olson v. Cory, 27 Cal.3d 532, 539-40, 178 Cal.Rptr. 568, 636 P.2d 532 (1980).[41]

The California Supreme Court has *never* upheld a statute or charter amendment which diminished the pension rights of public employees. The Court has said that some modifications may be made to a pension system prior to a public employee's retirement, but has placed severe restrictions upon the circumstances under which this may be done.

The leading California case on pension system modifications, *Allen v. City of Long Beach,* 45 Cal.2d 128, 287 P.2d 765 (1955), involved the validity of 1951 Long Beach City Charter amendments that attempted to impair the pension benefits of police officers and firefighters employed prior to 1945. In reversing the trial court's judgment upholding these modifications, the California Supreme Court said:

> An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system . . . *Such modifications must be reasonable,* and it is for the courts to determine upon the facts of each case

---

[41]Other cases in which California courts have struck down attempted impairments of public employee pension benefits include *Hittle v. Santa Barbara Courts Employees Retirement Assn.,* 39 Cal.3d 374, 216 Cal.Rptr. 733, 703 P.2d 73 (1985); *California Teachers Assn. v. Cory,* 155 Cal.App.3d 494, 202 Cal.Rptr. 611 (1984); *Pasadena Police Officers v. City of Pasadena,* 147 Cal.App.3d 695, 195 Cal.Rptr. 339 (1983); *Valdes v. Cory,* 139 Cal.App.3d 773, 189 Cal.Rptr. 212 (1983); *Olson v. Cory,* 27 Cal.3d 532, 178 Cal.Rptr. 568, 636 P.2d 532 (1980); *Abbott v. City of Los Angeles,* 50 Cal.2d 438, 326 P.2d 484 (1958); *cf. Sonoma County Organization of Public Employees v. County of Sonoma,* 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (1979) (attempted impairment of salary increase held invalid).

> what constitutes a permissible change. *To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. Id.,* 45 Cal.2d at 131, 287 P.2d 765 (emphasis added; citations omitted).

Petitioners' argument that California public employees have vested contract rights only to pension benefits "earned" at a given point in time and that their right to qualify for additional benefits by future services may therefore be impaired prospectively finds no support in California decisions. To the contrary, in *Carman v. Alvord,* 31 Cal.3d 318, 325, 182 Cal.Rptr. 506, 644 P.2d 192 (1982), the California Supreme Court said:

> By entering public service an employee obtains a vested right to earn a pension on terms substantially equivalent to those then offered by the employer.

To the same effect, *see Betts v. Board of Administration,* 21 Cal.3d 859, 863, 148 Cal.Rptr. 158, 582 P.2d 614 (1978); *Kern v. City of Long Beach,* 29 Cal.2d 848, 855, 179 P.2d 799 (1947). Accordingly, the distinction which petitioners seek to create between the protection afforded "earned" versus "unearned" pension benefits was properly rejected by the courts below, as it was in *Pasadena Police Officers Ass'n. v. City of Pasadena,* 147 Cal.App.3d 695, 195 Cal.Rptr. 339 (1983), wherein the court rejected the contention that *Allen v. City of Long Beach, supra,* does not preclude prospective modifications of a public employee pension system. The *Pasadena* court pointed out that the "earned" versus "unearned" distinction urged by the City of Pasadena is totally inconsistent with the statement quoted above from *Carman v. Alvord, supra,* 31 Cal.3d 318, 325, 182 Cal.Rptr. 506, 644 P.2d 192. The

California Supreme Court denied the City of Pasadena's petition for review of the court of appeal's decision.

Rejection of the "earned" versus "unearned" distinction urged by petitioners is not only the settled law of California; it is also right on the merits. If petitioners were correct on this issue, it would follow that a California public employer could not only *reduce* "unearned" COLAs but could *completely eliminate* such COLAs. Moreover, if petitioners were correct, a public employer could arbitrarily reduce "unearned" *basic pension benefits* — or even abolish a public pension system at any point in time, save for paying its employees the pension benefits they had "earned" prior to that date. For a police officer or firefighter in mid-career that would clearly be an egregious breach not only of contract but of faith. Moreover, it would be inconsistent with over 40 years of decisions by the California courts which have spelled out and protected the pension rights and benefits of public employees.

In this case, as in *Pasadena*, petitioners' "earned" versus "unearned" argument is based principally on the fallacious contention that a line of California decisions beginning with *Palaske v. City of Long Beach*, 93 Cal.App.2d 120, 208 P.2d 764 (1949), and culminating in *Houghton v. City of Long Beach*, 164 Cal.App.2d 298, 330 P.2d 918 (1958), supports that purported distinction. This argument was firmly rejected by the courts below and by the court of appeal in *Pasadena Police Officers Ass'n v. City of Pasadena*, *supra*, 147 Cal.App.3d 695, 705-06, 195 Cal.Rptr. 339.[42]

---

[42] Petitioners also contend that a contract incorporates the law existing as of the time of its formation, that *Houghton v. City of Long Beach* was the law in 1971 when the COLAs were uncapped, and that Charter Amendment H is therefore valid. This contention is plainly wrong because in *Pasadena* the California Court of Appeal rejected that very contention, holding, in effect, that *Allen v. City of Long*

B. The Petition For Certiorari Should Be Denied Because The Courts Below Correctly Held That Charter Amendment H Violates the Federal Contract Clause.

1. Charter Amendment H Is Invalid Under United States Trust Company of *New York v. New Jersey*, 461 U.S. 1 (1977).

Petitioners contend, in effect, that insofar as the federal Contract Clause is concerned, a public entity may elect not to pay its credtors and, instead, spend its funds for other purposes. Petitioners do not seemingly acknowledge *any* constitutional limitation on this alleged freedom of election, insisting that the courts must defer to a public entity's decision whether or not to honor its legal obligations (petition, pp. 22-29).

In purported support of their contention, petitioners seize upon the statement in the *United States Trust Company* opinion that an impairment by a public entity of its own contractual obligation "may be constitutional if it is reasonable and necessary to serve an important public purpose." *Id.*, 461 U.S. at 25. Ignoring the fact that the very next sentence in the opinion states that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because a State's self interest is at stake," petitioners argue that *United States Trust Company* gives *carte blanche* to a public entity to

---

Beach, *supra*, 45 Cal.2d 128, overruled the *Palaske* line of cases and that *Houghton* is not inconsistent with *Allen*. Thus, *Allen v. Long Beach* was the law and became a part of the contracts made between petitioners and respondents in and after 1971, thereby guaranteeing contractually that to which respondents were otherwise entitled by law: that their COLA benefits would remain uncapped unless and until modified in accordance with the restrictions imposed by that landmark decision. For this reason, among others, the advice allegedly given by the City Attorney to the City Council in 1971 (petition, p. 3) was wrong.

repudiate its own contractual obligation whenever it chooses to use the money for a different purpose (petition, pp. 22-29). However, as the following discussion demonstrates, the courts below properly held that *United States Trust Company* does not justify but, to the contrary, *condemns* the impairment of vested contractual pension rights effected by Charter Amendment H.

In *United States Trust Company* a 1962 statutory covenant between the States of New Jersey and New York limited the ability of their joint agency, the Port Authority of New York and New Jersey, to subsidize commuter rail passenger transportation from revenues and reserves pledged as security for consolidated bonds issued by the Port Authority to members of the public. A 1974 New Jersey statute, together with a concurrent and parallel New York statute, purported to repeal the 1962 covenant retroactively. The New Jersey courts upheld the New Jersey statute as a reasonable exercise of the police power. On appeal, this Court reversed, holding the 1974 legislation which impaired the 1962 statutory covenant to be in violation of the federal Contract Clause.

In an opinion by Mr. Justice Blackmun, the Court said that "... the Contract Clause limits otherwise legitimate exercises of State legislative authority, *and the existence of an important public interest is not always sufficient to overcome that limitation.*" *Id.*, 431 U.S. at 21 (emphasis added). The Court drew a key distinction between the level of scrutiny applied to impairments *where the public entity is itself the contracting party,* and the level of scrutiny applied when private contracts are impaired. Noting that it "has regularly held that the States are bound by their debt contracts," the Court said:

> ... The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations.... an impairment may be constitutional if it is reasonable and necessary to serve an impor-

> tant public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate *because the State's self-interest is at stake.* A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. *If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. Id.*, 431 U.S. at 25-26 (emphasis added).

The Court added that "... [a] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors ...." *Id.*, 431 U.S. at 29.

In this case, City officials acknowledged that Charter Amendment H was placed on the June 8, 1982 ballot because the City desired to use for other purposes the $32 million by which its annual contribution to the pension systems would be reduced, as of that date, if Charter Amendment H was approved by the voters. Trial testimony of City Mayor Bradley, R.T. 987:18-988:3; trial testimony of City Councilman Yaroslavsky, R.T. 935:9-21; 936:14-21. Citing *United States Trust Company,* as well as California authorities, the trial court held and the court of appeal agreed that the City's desire to spend this money for other purposes did not justify the impairment of the City's contractual obligations to its police officers and firefighters.[43] As both courts below correctly perceived, *United States Trust Company* clearly teaches that the City is barred by the federal Contract Clause from electing to spend for other purposes the money needed to honor the

---

[43]Trial court decision, App. 66a-67a; court of appeal decision, 210 Cal.App.3d at 1108-11, App. 13a-26a.

obligation which the City assumed in 1971 to maintain the purchasing power of respondents' pensions.[44]

Petitioners failed entirely to show that the City was or is unable to continue to pay the COLAs which were capped by Charter Amendment H. To the contrary and as summarized above (p. 5, *supra*), the evidence showed that the required additional $43 million annual pension contribution is less than 2% of the City's general budget (a percentage that will diminish as the City's budget increases), that the City's expenditures increased by approximately $200 million (10%) *per year* after Charter Amendment H was enacted, and that in less than a year following its enactment, the City imposed $120-$130 million in *new* taxes to meet an anticipated budget shortfall. Clearly, the City's problem is not poverty but lack of the political will to take the actions necessary to meet its obligations to fund the Article XVII and Article XVIII pension systems. Accordingly, the courts below correctly found unpersuasive the purported justification of Charter Amendment H offered by petitioners.

2. The Impairment Caused by Charter Amendment H Is Severe.

In *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234 (1978), wherein this Court struck down under the federal Contract Clause a 1974 Minnesota statute that subjected specified private employers to a "pension fund-

---

[44]Petitioners contend that the trial court found that Charter Amendment H was enacted to accomplish several specific public purposes (petition, p. 22). This contention is less than accurate. At App. 61a-62a, cited by petitioners, the trial court said only that defendants *contended* that *some* of these public purposes are served by Charter Amendment H. At App. 66a, the trial court said that the purposes for which Amendment H was enacted were important public purposes without defining what those purposes were.

ing charge" if they terminated a qualified pension plan or closed a Minnesota office, the Court said:

> . . . the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimum alteration of contractual obligations may end the inquiry at its first stage. *Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. Id.* 438 U.S. at 244-45 (fn. omitted; emphasis added).

As shown above (pp. 1-2, *supra*) there is no question in this case that the impairment of vested contractual rights caused by Charter Amendment H is severe, involving potential losses of hundreds of thousands or even millions of dollars in the case of some pension system members and their spouses.[45]

3. The City Is Able to Raise The Revenues Necessary to Fund the Pension Systems.

Adoption of Charter Amendment H was not reasonable and necessary in 1982 because the City had ample means available to raise the funds necessary to fund the COLAs which were capped. To begin with, the City both had the power and was under a legal duty to levy taxes for that purpose. City Charter §§ 186.2 and 190.09 provide that:

> For the purpose of providing funds to meet the budget [of the Article XVII and Article XVII pension systems, respectively], the [City] Council or the Controller annually *shall* levy, in *addition* to all other taxes levied by the City, a tax *clearly sufficient* to

[45]In contrast, the impairment of the security interests of Port Authority bondholders in the *United States Trust Company* case was more technical than it was economically damaging or threatening.

> provide the total amount of *all* items in said budget (emphasis added).

As the trial court held,[46] by virtue of these provisions the City had both the power and the duty to levy whatever taxes were necessary to fund the pension systems.

Petitioners' response to respondents' reliance on City Charter §§ 186.2 and 190.09 was the astonishing testimony that the Los Angeles City Council simply *will not comply* with its legal obligation to levy the mandated taxes. Trial testimony of City Councilman Yaroslavsky, R.T. 924:1-8; trial testimony of City Chief Administrative Officer Comrie, R.T. 669:20-670:14. It is thus apparent that the "dilemma" and prospective "financial crisis" with which petitioners say they were and are faced was and is entirely of their own making.

In the courts below petitioners contended that the City is not able to levy the taxes mandated by City Charter §§ 186.2 and 190.09 because of the enactment in 1983 of California Revenue and Taxation Code §§ 97.2 and 97.6, which purport to impose a dollar-for-dollar penalty on any city, county or special district that levies a real property tax rate in excess of the rate imposed in fiscal year 1982-83 for the purpose of funding the payment of a voter-approved indebtedness, such as a public employee pension system. This contention is without merit.

Revenue and Taxation Code §§ 97.2 and 97.6 apply only to additional *real property taxes* imposed to pay pension system costs, whereas the duty mandated by City Charter §§ 186.2 and 190.09 is *not limited* to the imposition of real property taxes. Moreover, as the court of appeal held, if §§ 97.2 and 97.6 were interpreted to disable the City from complying with its duty to honor the vested contractual rights of its police officers and firefighters, these statutes

---

[46]Trial court decision, App. 67a.

would themselves be invalid under the federal Contract Clause.[47]

Moreover, the trial testimony of respondents' municipal finance expert, Douglas Ayres, demonstrated that the City has available other methods than increased taxation to continue to fund the COLAs which were capped by Charter Amendment H, *i.e.*, new or enhanced user fees. R.T. 1046-72. Many such non-tax-revenue enhancements, most notably the imposition by the City of a refuse collection fee (imposed by many municipalities), have been recommended in various City-sponsored reports suggesting means of raising substantial additional revenue to provide increased levels of police protection and other City services. *See, e.g.,* Trial Exhibit 174, 9 C.T. 3156; Trial Exhibit 175, 9 C.T. 3171; Trial Exhibit 176, 9 C.T. 3180-81; and Trial Exhibit 177, 9 C.T. 3191.

4. The Risk of the Inflation Which Increased Pension System Costs Was Foreseen in 1971.

A consideration relevant to the validity of a public entity's attempted impairment of its own obligation is the foreseeability of the circumstances said to justify the

---

[47]Court of appeal decision, 210 Cal.App.3d at 1114, App. 22a. A state may not prevent the fulfillment by a municipality of its duty to pay its legal obligations by depriving the municipality of the taxing power required to raise the needed funds. *Louisiana ex rel. Hubert v. New Orleans,* 215 U.S. 170, 175-76 (1909) ("... where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied ... and ... it is an impairment of the obligation of the contract to destroy or lessen the means by which it can be enforced."); *Wolff v. New Orleans,* 103 U.S. 358, 365 (1880); *Van Hoffman v. City of Quincy,* 71 U.S. (4 Wall) 535, 554 (1867); *see also United States Trust Company of New York v. State of New Jersey, supra,* 431 U.S. at 24 n.22; *Sonoma County Organization of Public Employees v. County of Sonoma,* 23 Cal.3d 296, 314, n. 17, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Carman v. Alvord,* 31 Cal.3d 318, 332-33, 182 Cal.Rptr. 506, 644 P.2d 192 (1982).

impairment. *United States Trust Co. of New York v. New Jersey, supra,* 431 U.S. at 31-33 (majority opinion and concurring opinion of Chief Justice Burger). Petitioners imply that when the COLAs were "uncapped" by Los Angeles voters in 1971 the risk of the high inflation that followed was neither foreseen nor foreseeable. (Petition, p. 3.) This implication was rejected by the court of appeal[48] and is unwarranted for two reasons. Before the Council unanimously voted in 1971 to put on the ballot the City Charter amendment which uncapped the COLAs, the Council was plainly warned that inflation might exceed expectations. The City's then Chief Administrative Officer, C. Erwin Piper, addressing that issue, said:

> In the current wage and price spiral, the two percent ceiling on cost-of-living adjustments does not keep pace with the rate of increase in the Consumer Price Index (CPI), which indicates the cost-of-living has increased about five percent over the last year in the Los Angeles area. However, the past history of the CPI indicates that the rate of increase of the CPI is cyclical. There have been several periods like the present with high annual rates of increase followed by relatively stable periods with slow rates of increase, or even a decline in the index. It is probable that the present high rate of increase will not continue indefinitely. *However, we cannot be sure how long the current rate of increase will continue or that it will not change to a higher rate. It, therefore, appears unwise to remove the ceiling on year-to-year increases because of the possible financial cost involved.* 9 C.T. 3071 (emphasis added).

In addition, the very prior existence of the 2% cap which was removed in 1971 shows that City officials had been and were then aware of the risks involved in an

---

[48]Court of appeal decision, 210 Cal.App.3d at 1113-14, App. 21a.

uncapped COLA. The policy decision nevertheless made, by both the City Council and Los Angeles voters, was that the citizens of the City, rather than its retired police officers and firefighters, should bear the risk that inflation might outstrip past history and then-current expectations. That assurance having been given — and having resulted in detrimental reliance by respondents — the City's obligation to honor the contractual obligation thus created became irrevocable under the California law discussed above and relied upon by the courts below.

CONCLUSION

For the reasons set forth above, review of this case on writ of certiorari should not be granted.

DATED: December 15, 1989

Respectfully submitted,

JOHN R. MCDONOUGH*
J. STEVEN GREENFELD
Ball, Hunt, Hart, Brown and Baerwitz

LESTER G. OSTROV
Fogel, Feldman, Ostrov, Ringler & Klevens

Attorneys for Respondents

---

*Counsel of Record

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 15, 1989, I served the within Brief in Opposition to Petition for a Writ of Certiorari in re: "City of Los Angeles; Board of Pension Commissioners of the City of Los Angeles vs. United Firefighters of Los Angeles City" in the United States Supreme Court, October Term 1989 No. 89-816, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

John Daum, Counsel of Record
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071

James K. Hahn
City Attorney
1700 City Hall East
Los Angeles, California 90012

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 1989, at Los Angeles, California.

Donna Rodgers

DONNA RODGERS